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AUG 28 1984
ALEXANDER L. STEVAS.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

NO._____

DAVID LEE GAMBLE, Petitioner,

vs.

ANITA MARIE VAN DER EYKEN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

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33pp

QUESTIONS PRESENTED

I

Whether the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution are violated by a state statute which permits the state courts to exercise in personam jurisdiction over a nonresident because he was served with process within the state?

II

Whether the due process "minimum contacts" requirement for in personam jurisdiction under the Sixth and Fourteenth Amendments to the United States Constitution apply to the service of process on a nonresident served within the state?

III

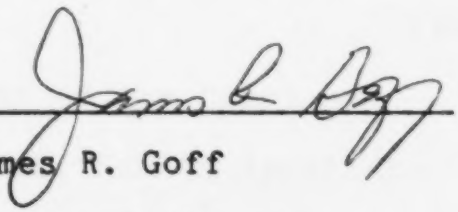
Does a nonresident's visit with his

minor children pursuant to a state court ordered visitation constitute the "minimum contacts" necessary for due process under the Sixth and Fourteenth Amendments to the United States Constitution?

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned Petitioner, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable Justices of the Court to evaluate possible disqualifications or recusal.

There are no other interested parties other than those named in the caption of this case and their attorneys of record.

by 

James R. Goff

Member of the Bar

United States Supreme Court

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The petitioner David Lee Gamble respectfully prays that a writ of certiorari issue to review the judgment

and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three entered in this proceeding on April 24, 1984. (See Appendix "A").

OPINION BELOW

The Court of Appeal denied David Gamble's petition for an extraordinary writ of mandate by a minute order which is attached as Appendix "A". Similarly, the Supreme Court of the State of California denied discretionary review by a post card minute order of denial. A copy of the minute order denial is included in the appendix.

JURISDICTION

The judgment of the Court of Appeal for the State of California, Fourth Appellate District, Division Three was entered on April 24, 1984. A petition for hearing to the Supreme Court of the State of California was denied on May 30, 1984.

(See Appendix "B")

This court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution provides in section 1 that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The dispute in this case arose out of an attempt by Anita Marie Van Der Eyken to obtain an order from a California State court for an increase in the child support paid by David Lee Gamble, father of the children. Mr. Gamble had paid and continues to pay the child support ordered by the court in the State of Alabama, where Mr. Gamble was divorced by Ms. Van Der Eyken.

On November 28, 1983, Ms. Van Der Eyken filed in the Orange County Superior Court in the State of California a certified copy of the initial dissolution and custody decree from the State of Alabama. (See Exhibit A of the Petition for Writ of Mandate in the State Court) At the same time Ms. Van Der Eyken filed an Order to Show Cause for modification of child support and request for attorneys

fees and costs.

David Lee Gamble was served with the papers noted above while he was exercising his right to visit his children under the Alabama State Court order. He was served on Christmas Eve, December 24, 1983.

On February 17, 1984, Mr. Gamble appearing specially through his attorney filed a Notice to Quash Service of Process with attached Memorandum of Points and Authorities including the declaration of David Gamble. (See Exhibit F of Petition in State Court)

On March 9, 1984, a hearing on the motion to quash was heard in the Orange County Superior before the Honorable Robert A Knox, judge presiding. The trial court after reviewing the papers and the file denied the motion to quash. (See Reporter's Transcript of Proceedings of March 9, 1984)

The declarations filed with the

various papers in regard to the motion to quash the service of process (See especially Exhibits F and G to the Petition for Writ in the State Court) established the following facts:

In 1970, and prior to that time Anita Marie Van Der Eyken lived in California. David Lee Gamble was in the Navy in 1970 and was stationed in Long Beach, California. During that year Mr. Gamble met Ms. Van Der Eyken and they became friends. While he lived at the Naval Base for nine months in 1970, Mr. Gamble had his mail delivered to Ms. Van Der Eyken's address.

David Lee Gamble remained a registered voter in the State of Alabama while he was in the Navy. He did not become a registered owner of a vehicle while he was in the State of California.

The parties were married on November 8, 1970 in Long Beach, California. They

immediately moved to the State of Alabama. They remained domiciled in Alabama from 1970 to 1979.

In 1979, the parties were divorced in the State of Alabama and Ms. Van Der Eyken took the minor children of the marriage and moved to California.

David Lee Gamble visited his children in California for one week in the years 1979, 1980, 1981, and 1983. In November, 1982 and June, 1983 David Gamble mailed tickets for his children to visit him in Tennessee.

After denial of the motion to quash David Lee Gamble filed a petition for a writ of mandate in the intermediate appellate court of the State of California. The Court of Appeal, Fourth Appellate District, Division Three denied the petition for writ on April 14, 1984. (See Appendix) One member of the three member court of appeal dissented

indicating that he would have granted the alternative writ application.

On May 30, 1984, the Supreme Court of the State of California denied Mr. Gamble's petition for hearing. (See Appendix) Neither the intermediate appellate court nor the State Supreme Court stated any grounds for denial of the requests for a hearing.

REASONS FOR GRANTING THE WRIT

1. THE DECISION IN THIS CASE IS IN CONFLICT WITH THE PRINCIPLE THAT MINIMUM CONTACTS ARE NECESSARY FOR JURISDICTION OVER NONRESIDENTS.

The basic constitutional restriction on the exercise of jurisdiction over a nonresident defendant is the requirement of sufficient "minimum contacts" between the defendant and the forum state to make it fair to require him to defend the lawsuit there. World Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286 [62

L.Ed.2d 490, 100 S.Ct. 559]; Kulko v. California Superior Court (1978) 436 U.S.84, 92 [56 L.Ed.2d 132, 141, 98 S.Ct. 1690, 1697]; International Shoe Co. v. Washington (1945) 326 U.S. 310, 316 [90 L.Ed. 95, 101-102, 66 S.Ct. 154, 158, 161 A.L.R. 1057].

California Code of Civil Procedure, Section 410.10, provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Further, California Code of Civil Procedure, Section 410.50 (a), provides:

> "Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him as provided by Chapter 4 (commencing with Section 413.10)."

Finally, in California Code of Civil Procedure, Section 415.10, it is indicated that:

> "A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery."

Only two cases have been found which deal with a nonresident of California served in the state which involved a similar lack of "minimum contacts". In Kumar v. Superior Court (1982) 32 Cal.3d 689, the California Supreme Court said:

> "Principles of fairness preclude the exercise of personal jurisdiction where connection with the state resulted from an effort to encourage visitation with the noncustodial parent. (Cit. Om.) This is

especially true in the instant case, where Jitendra was virtually forced into the California court because Yvonne denied him his visitation rights. It would be grossly unfair to allow her now to claim that he thereby established "minimum contact" sufficient to establish personal jurisdiction." (32 Cal.3d 689, 703)

The other case was decided by an intermediate appellate court. In Frederick Fell, Inc. v. Superior Court (1973) 36 Cal.App.3d 93, 96, the Court of Appeal found that service of process on Mr. Fell, President of petitioner in California where he was attending a convention was not the "minimum contacts" necessary to establish jurisdiction in California.

In the above cases, California

recognized that applicability of the due process "minimum contacts" standard as being applicable to a nonresident served within the boundries of the state. When David Gamble made his motion to quash service of process the trial court relied on the above referenced statutes to conclude that they applied and not the "minimum contacts" standard. The California reviewing courts in denying a hearing to David Gamble's petition for a writ of mandate created a conflict not only with its own decisions but with the principles recognized by this Court in announcing the "minimum contacts" standard to the due process clause of the Sixth and Fourteenth Amendments to the United States Constitution.

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2. THERE IS A DEARTH OF AUTHORITY ON THE APPLICABILITY OF THE DUE PROCESS "MINIMUM CONTACTS" STANDARD ON SERVICE OF PROCESS ON NONRESIDENTS WITHIN THE STATE.

Previously,this Court has not applied the "minimum contacts" principle to the situation that occurred in this case of a nonresident on a temporary visit who is served within the state claiming jurisdiction. The lack of clear authority in this area resulted in the injustice which has occurred in this case and may have affected many others caught in the same dilemma.

In today's society which involves more and more families divided over state borders the problems evidenced in this case will no doubt multiply in the coming years. Only clear guidelines on the applicability of the "minimum contacts" principle will stave off an avalanche of litigation over this issue.

A decision on this issue is a logical progression from World Wide Volkswagen Corp. v. Woodson, and Kulko v. California Superior Court. Those cases dealt with long arm statutes. However, there is no reason to limit the application of due process protection to citizens served in their domicile state and to neglect its application to nonresidents served on temporary visits to the state claiming jurisdiction. The criteria for application of "minimum contacts" works equally well in determining jurisdiction over nonresidents served within the state claiming jurisdiction. Further, as in the California cases discussed above, its application prevents the kind of unfairness that the due process clause was meant to protect against.

3. THE "MINIMUM CONTACTS" STANDARD WAS NOT MET BY THE FACTS IN THIS CASE.

The only contacts that David Gamble

had with the state of California was that when his wife divorced him she took their children and moved to California. Thereafter, the only way he could have contact with his children was to pay to have them visit him or to visit them in California. It is inconsistent with the public policy to promote contacts between parents and their children to build obstacles to those contacts by holding that if a parent visits his child the state where the visit occurs has personal jurisdiction over that parent.

This Court said in Kulko v. California Superior Court, supra., 432 U.S. 85 [56 L.Ed.2d 132, 146-147, 98 S.Ct. 1690]:

"It cannot be disputed that California has substantial interest in protecting resident children and in facilitating child support actions on behalf of those children. But these

> interests simply do not make California a 'fair forum'(cit. om.), in which to require appellant, who derives no personal or commercial benefit from his child's presence in California and who lacks any other relevant contact with the state, either to defend a child-support suit or to suffer . . . liability by default."

Although Kulko, was decided in another context the analysis is relevant and applicable to this case. David Gamble derived no commercial or other benefit from having his family live in California. In fact his family's presence was a burden because of the increased costs of transporting them for visits and because the distance decreased the opportunities for additional visits. The respondent could have made use of the

revised Uniform Reciprocal Enforcement of Support Act of 1968, instead of trying to drag David Gamble to California.

David Gamble had no reason to suspect that he could be haled into a California court just because he visited there. Normally, citizens do not suspect that because they visit a state they are submitting to that state's jurisdiction if nothing occurs in the state to warrant the exercise of jurisdiction.

Public policy in most states encourages visits between noncustodial parents and their children and would be loathe to create obstacles to those visits. The visits are beneficial to the California residents. The visits promote responsible behavior by parents toward their children which diminishes the prospect that the children will become public wards. An interpretation of "minimum contacts" which meant that any

parent who visited his child would be subject to personal jurisdiction of the state where the visit took place would lead to diminished if not total elimination of those visits. If the parents are blocked from visits by such an obstacle the result is likely to be a diminution in responsible parental concern, an increase in non-support cases and disintegration of the family unit.

This Court should issue a writ of certiorari to clarify the application of "minimum contacts". Any clarification would establish that the circumstances of this case do not meet that standard. California should not be permitted to exercise personal jurisdiction over David Gamble.

CONCLUSION

The due process limitations of the Fifth and Fourteenth Amendments to the United States Constitution encompassed in

the "minimum contacts" principle require the issuance of a writ of certiorari by this Court to establish the applicability of those protections to a nonresident served within a state he is visiting where there are no other contacts on which to base personal jurisdiction.

Respectfully submitted,
James R. Goff
Counsel for Petitioner

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OCTOBER TERM, 1984

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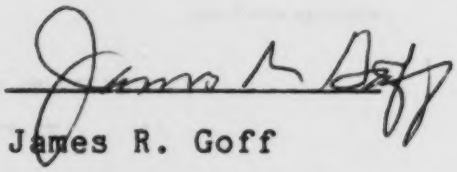
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

I hereby certify that on August 28, 1984, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Robert B. Edmondson, Esq., 5808 W. Naples Plaza, Long Beach, CA 90808. Counsel for the Respondent. I

further certify that all parties required to be served have been served.



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Counsel for Petitioner

APPENDIX "A"

FILED
Kenneth G. Crosby, Clerk
APR 24 1984
COURT OF APPEAL FOURTH DISTRICT

IN THE COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

THIRD DIVISION

E GAMBLE, Petitioner,	)	G001248
vs.	)	Orange County No. 417012
COURT, ORANGE COUNTY, Respondent;	)	O R D E R
RIE VAN DER ZYKEN, Real Party in Interest.	)	

T:

The petition for a writ of mandate is DENIED.

s/Wallin
Acting Presiding Justice

s/Brickner
J. J. *

t. I would grant the alternative writ application.

s/Crosby
J.

d by the Chairperson of the Judicial Council.

attached sheet

BEST AVAILABLE COPY

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

MAY 30 1984

I have this day filed Order HEARING DENIED

In re 4 Civ. *No.* G001248

DAVID LEE GAMBLE

vs. R/C

Superior Ct., Orange
(ANITA MARIE VAN DER EYKEN)

Respectfully,

Clerk

-877 8-82 4M • CSP

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